CONTENTS.

CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 133.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, APPELLANT,

v.

THE UNITED STATES.

No. 232.

KANSAS CITY, MEXICO AND ORIENT RAILWAY COMPANY OF TEXAS, APPELLANT,

v.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

INTRODUCTION.

This is the second appearance in this court of what have come to be known as the "Divisor Cases." They are representative of claims for additional compensation for carrying the mails, made by about 800 railroads and involving an amount said to approximate $35,000,000. The questions here presented

first came before this court in *Chicago & Alton Railroad* v. *United States* and *Yazoo & Mississippi Valley Railroad* v. *United States* 242 U. S. 621.

Those cases were twice argued and the judgments of the Court of Claims in favor of the United States were affirmed, without opinion, by an equally divided court. Other cases of the same character were then pressed for decision in the Court of Claims. That court considered again the questions involved and reviewed its action. In explaining its reasons for so doing (R. 55),[1] it said:

> It was therefore decided to hear the parties again in argument and certain typical cases have been prepared with the view of presenting all of the questions that it is supposed can arise in these so-called divisor cases. The plaintiffs' attorneys have accordingly been heard in extended oral argument and they have filed able and extensive briefs. They have probably left nothing unsaid that would tend either to elucidate the questions involved or to show the rights of plaintiffs to recover. As we adhere to the conclusion that the petitions should be dismissed, we will deal more at length with the cases than would be done by the mere announcement of a conclusion of law. There are some differences in the cases, but we think they can all be disposed of in one opinion.

The typical cases referred to by the court are these cases and the two others which have been

[1] Except as otherwise specially noted, references will be to the record in the *New York Central Case*, No. 133.

ordered to be argued here at this time.[1] The Government has incorporated in this brief its discussion *in extenso* of the principal questions of law which the four cases present. Because the other cases are those of land-grant roads it has filed in them separate briefs, dealing with this subject and with some additional matters arising therein common also to all the cases.

The Court of Claims dismissed the petitions. The opinion of the court, by the Chief Justice, is an exhaustive discussion of the subject. The associate judges of the court severally filed concurring opinions. The claimants appealed.

The cases raise a very important phase of the long and many-sided controversy between the carriers and the Post Office Department over compensation for carrying the mails. The act of July 28, 1916 (39 Stat. 412, 419), which imposes upon the railroads a definite obligation to carry the mails and provides machinery for determining just compensation therefor, will at least give these matters a wholly new form for the future. While this act has no direct bearing upon the present suit except to throw light reflexly on the previous state of the law, it does have the effect that the court is not now asked to lay down a rule for the future, but only to decide the existing dispute.

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[1] *Northern Pacific R. R.* v. *United States*, No. 109; *Seaboard Air Line Rwy.* v. *United States*, No. 132.

THE FACTS.

No. 133. New York Central & Hudson River R. R. Co.

The arrangements under which this claimant had been transporting the mail upon certain of the routes served by it expired on June 30, 1909. On August 17, 1908, the Post Office Department informed the claimant of its intention to conduct the usual quadrennial weighing of the mails carried upon these routes "for the purpose of obtaining data upon which the department may adjust the pay for mail service on the route (in accordance with the several acts of Congress governing the same) from July 1, 1909." The notice also cited and quoted the Postmaster General's order No. 412, commonly known as the divisor order, as to the divisor to be used in ascertaining weights.

These statutes were the act of March 3, 1873 (Rev. Stat., sec. 4002), as amended or affected by the acts of March 3, 1875 (18 Stat. 341); July 12, 1878 (19 Stat. 79); June 17, 1878 (20 Stat. 142); March 3, 1905 (33 Stat. 1088), and March 2, 1907 (34 Stat. 1212).[1]

The act of 1873 made an appropriation for the increase of compensation for the transportation of mail on railroad routes "upon the conditions and at the rates hereinafter mentioned";

[1] Certain other statutes thought to throw light upon the meaning and effect of these statutes are noted *infra*. Those here referred to constitute, however, the legislation which is controlling in these cases.

Provided, That the Postmaster General be, and he is hereby, authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes *upon the conditions and at the rates hereinafter mentioned*, to wit, *that the mails shall be conveyed with due frequency and speed;* that sufficient and suitable room, fixtures, and furniture in a car or apartment properly lighted and warmed shall be provided for route agents to accompany and distribute the mail *and that the pay per mile per annum shall not exceed the following rates.* On routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars [etc.], *the average weight to be ascertained in every case by the actual weighing of the mails for such a number of successive working days not less than thirty at such times after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct* . . . [Italics ours.]

The act of 1875 added a direction that the Postmaster General should have the weighing done by the employees of the Post Office Department and the weights "should be stated and verified to him by said employees under such instructions as he may consider just to the Post Office Department and to the railroad companies."

The acts of 1876 and 1878 affected the situation only by requiring reductions in certain percentages from the rates theretofore allowed. Claimants base

a contention upon the wording employed in these statutes. This will be examined in due course.

The only change in the statutory situation made by the act of 1905 was to substitute ninety for thirty in stating the minimum weighing period. The proviso making this change reads:

> *Provided*, That hereafter before making the readjustment of pay for transportation of mails on railroad routes, the average weight shall be ascertained by the actual weighing of the mails for such a number of successive working days, *not less than ninety*, at such times after June thirtieth, nineteen hundred and five, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct.

The act of 1907 required a further reduction in rates per mile per annum upon routes carrying an average daily weight of upward of 5,000 pounds. It made no change with respect to roads carrying smaller average weights of mail per day.

On June 7, 1907, Order No. 412, which was a modification of Order No. 165 made in March, was made. It reads:

> Order No. 412.—Ordered that Order 165, dated March 2, 1907, be, and the same is hereby, amended to read as follows:
>
> That when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day.

Under these statutes, then, the Post Office Department, as has been said, announced to the claimant its intention to conduct the customary quadrennial weighing of the mails carried by it for the expressed purpose of obtaining data upon which the department might adjust the payments to be made to it. He sent to it, as was also customary, a "distance circular," so-called, to be filled out and returned for the purpose of giving certain information not here material. The circular contained what is sometimes called an acceptance clause, which read:

> The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to railroad mail service.

The claimant filled out and returned the distance circular. It did not fill out or sign the acceptance clause, but appended a form of acceptance, dated November 24, 1908, reading as follows:

> The company named below agrees to accept and perform mail service upon the conditions prescribed by law and existing regulations of the department applicable to railroad mail service excepting order No. 412, issued by the Postmaster General June 7, 1907. This company can not accept as full compensation for services rendered the amount fixed according to the method of computation of average weight prescribed by said order, and reserves the right to insist on payment according to the method of computing the average weight

> applied by the department prior to the issuance of order No. 165, issued by the Postmaster General March 2, 1907. (Finding XII, R. 29.)

The reply of the department, dated January 5, 1909 (R. 29), noted the objection to Order 412 and replied specifically to such objection as follows:

> In regard to this, I have to advise you that the department will not enter into contract with any railroad company by which it may be excepted from the operation or effect of any postal law or regulation, and it must be understood that, in the performance of service, from the beginning of the contract term above named and during the continuance of such performance of service, your company will be subject, as in the past, to all the postal laws and regulations which are now or may become applicable during the term of this service.

The claimant made no reply to this letter. (R. 30.)

The Postmaster General then caused the mail to be weighed, and on July 1, 1909, notified the claimant that compensation upon the routes upon which service was to be rendered by this claimant had been fixed by him at certain aggregate amounts. An order was made directing payment to the claimant in those specified amounts. (Finding XII, R. 30.)

The claimant carried the mail upon the routes in question and was tendered and accepted without protest payment of the sums named in the communication of July 1, 1909. (Finding XIV, R. 33; Finding XVI, R. 34.)

The petition herein was filed April 6, 1914, and claims for services rendered between July 1, 1909, and July 1, 1913. A total recovery exceeding $1,250,000 is asked.

No. 232, Kansas City, Mexico and Orient Railway Company.

Claimant, the Kansas City, Mexico and Orient Railway Company, is a corporation organized and existing under the laws of the State of Texas, and operates, and for a long time has operated, in the States of Oklahoma and Texas, a railroad over which it has transported the mails of the United States, more than six round trips per week, under quadrennial agreements with the Postmaster General, between Altus, Okla., and San Angelo, Tex., a route authorized by the Postmaster General and designated as No. 150106.

In the construction of the above line of railroad plaintiff was not aided by any grant of lands or other property made thereto by the United States.

The plaintiff entered into two contracts with the Postmaster General, which were identical, one of them taking effect on the 1st day of July, 1910, and the other on the 1st day of July, 1914.

The arrangement under which the above railway had been transporting the mail on the route served by it was to expire on June 30, 1910. On February 4, 1910, the Postmaster General wrote to the claimant stating his intention to conduct the usual quadrennial weighing of the mails carried upon this route "for the purpose of obtaining data upon which the

department may adjust the pay for mail service on the route (in accordance with the several acts of Congress governing the same) from July 1, 1910." (Rec. 232, Finding XIII.) (For a minute of the acts of Congress and extracts therefrom, *supra*, pp. 4–6.)

In said letter the Postmaster General also called to the attention of claimant that the weighings would be made according to Order No. 412, which he quoted. (For a copy thereof, see *supra* p. 6.) The Postmaster General sent to it, as was also customary, a "distance circular," so-called, to be filled out and returned for the purpose of giving certain information not here material. The circular contained what is sometimes called an agreement (or acceptance) clause, which read:

> The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the department, applicable to railroad mail service.

On March 30, 1910, the claimant returned the distance circular above referred to duly signed.

The Postmaster General caused the average daily weight of mail carried by the claimant to be calculated as provided in Order No. 412 and on the basis of the weight thus found he stated the compensation for carrying the mails upon the route served by the claimant. The claimant thereafter carried the mail over this route and received compensation as stated.

On March 9, 1912, the United States District Court appointed receivers for the claimant company and they retained possession of the property of the claimant until July 8, 1914, when they were discharged. (Rec. 232, Finding XI.)

In February, 1914, a distance circular was sent to the receivers of the claimant for the purpose of readjusting pay for the new term beginning July 1, 1914. The distance circular was returned duly signed and with it was sent a letter reading as follows:

> DEAR SIR: The inclosed railroad distance circulars bearing date of February 9, 1914, referred to in your letter February 9, 1914, are filed without waiver of rights, consent, or acknowledgment that the manner and method of weighing mail as now determined by Postmaster General's Order No. 412 is a legal method for determining the pay or compensation to the receivers for the handling and the carrying of mail, nor by the filing of said railroad distance circulars do the receivers waive or discharge any rights or remedies sought to be established or enforced by any legal proceedings now pending.

The reply of the department, dated April 8, 1914, noted the objection to Order 412 as follows:

> "With regard to this, I have to inform you that, notwithstanding the same, the Post Office Department will not enter into contract with any railroad company by which it may be excepted from the operation or effect of any postal law, regulation, or order of the Postmaster General; and it must be understood that in the performance of service from the

beginning of the contract term above named and during the continuance of such performance of service, your company will be subject, as in the past, to all the postal laws, regulations, and orders of the Postmaster General which are now or may become applicable during the term of this service; and that no other or further compensation for such service performed will be paid than that fixed by the orders of the Postmaster General.

With special reference to the order of the Postmaster General of June 7, 1907, No. 412, your attention is called to my letter of June 30, 1913, respecting its application and to the fact that the amount of compensation for the transportation of the mails which will be fixed after making such application is all the compensation that will be paid for such service on the routes named. (Finding XI, R. 20.)

No reply appears to have been made by the claimant to this letter.

An order dated August 22, 1914, stated the sum which the claimant would be paid for carrying the United States mail over its route. The claimant continued to carry the mails as offered to it and it received without protest payments as stated in said order.

It affirmatively appears that plaintiff after objection made was informed that the sum which it would receive was such sum as was reached by applying the weights reached by the method prescribed in Order No. 412 to the rates of payment fixed by the Postmaster General in accordance with the statutes.

The petition herein was filed October 11, 1911. It was amended January 21, 1918, to include what was claimed on account of services between 1911 and October 31, 1916. A total recovery of $11,888.77 is asked.

THE CONTENTIONS OF THE PARTIES.

The principal contention of all of the claimants in these divisor cases rests upon the assertion that Order No. 412 was invalid. That order, as above stated, directed that in computing the average weight per day of mail carried over any given route, the total of the weights obtained by weighing upon every day upon which mail was carried during the designated weighing period should be divided by the whole number of days included in that period. This was a departure from the previous practice in which what was treated as the average daily weight was obtained by dividing the total amount of weight carried during the weighing period by the number of days other than Sundays in the period. Mail carried on Sundays had, however, been weighed on those days and included in the dividend.

The appellants contend that the earlier practice of the department was in obedience to the law and that any departure therefrom was forbidden by the law. The law referred to is the statutes of 1873 and 1905, previously set out, and it is upon those statutes, as they construe them, that appellants rely.

The suits are to recover the difference between the amount actually offered and paid by the Post Office Department to the carriers for the services

rendered and an amount obtained by applying the maximum rates permitted by the statute to a so-called "average weight" computed under the rule for which the carriers contend.

All the various claimants rely upon the premise that Order No. 412 was invalid, but they proceed to the conclusion that they are entitled to the recovery claimed by somewhat different paths. Since, however, each must face the facts that the Postmaster General named a specific amount as that which he would pay for the service proposed and that without subsequent protest they performed the service and accepted the payments tendered, all seek to avoid the effect of these circumstances by contending that, despite these facts, the Postmaster General was bound to pay the amounts which they claimed because, they say, Congress had fixed their compensation at the amount claimed by the acts of 1873 and 1905. They say those statutes require the application of the maximum rates fixed to average weights calculated by the use of the divisor used before 1907. Since such a contention depends primarily upon the meaning of those statutes, they seek to support it by argument based upon alleged contemporaneous departmental construction and by inferences drawn from the language and legislative history of certain statutes, said to be *in pari materia*.

To this the Government replies that the making of such contracts for the carriage of mail and the terms thereof have always been left by Congress, within certain maxima, to the discretion of the Postmaster

General; that in these cases the appellants voluntarily entered into contracts with the United States, under which they have been paid all that was promised; that it is not material to any question here presented whether, in making his offer, the Postmaster General followed strictly the directions of Congress; but that in fact he did comply with every restriction upon his discretion.

It denies that anything in the statutes relied upon, in departmental action under them, or in the subsequent action of Congress, leads to the conclusion that Congress has in any respect fixed a divisor which the Postmaster General must use in arriving at the basis for the classification which is to determine the limits of the application of maximum rates prescribed; and it says that Order No. 412 was not only a valid exercise of the Postmaster General's discretion, but was wise and just both to the carriers and to the United States.

It also insists that if the statute had fixed the amount the Postmaster General should pay for services, the mails to be carried with due frequency and speed, while the Postmaster General could not bind the United States to pay more than such rate, a contract accepted by plaintiffs for a *less* rate would bind them and they could not recover after acceptance, even if they might have coerced a contract at a higher rate.

The issues are thus made up.

ARGUMENT.

I.

CONGRESS HAS NEVER FIXED THE COMPENSATION TO BE PAID FOR TRANSPORTING THE MAILS, BUT UNTIL THE PASSAGE OF THE ACT OF 1916 REPOSED IN THE POSTMASTER GENERAL FULL DISCRETION, WITHIN CERTAIN MAXIMA, TO NEGOTIATE SUCH CONTRACTS AS SEEMED TO HIM JUST AND REASONABLE.

A. This is Shown by the Language of the Statutes.

1. LEGISLATION BEFORE 1873.

From the very beginning, Congress made it the duty of the Postmaster General to arrange by contract for the carriage of the mails and to that end consistently reposed in him the very widest discretion. It has made very few restrictions upon his exercise of that discretion, and those only in plain and unmistakable terms. It was long ago observed by Mr. Justice McLean, speaking for this Court in *United States* v. *Macdaniel*, 7 Pet. 1, 13, that

> A practical knowledge of the action of any one of the great departments of the government must convince every person that the head of a department in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government would evince a most

> unpardonable ignorance on the subject. Whilst the great outlines of the movements may be marked out, and limitations imposed upon the exercise of its powers, there are numberless things which must be done that can neither be anticipated nor defined, and which are essential to the proper action of the government.

These considerations are especially applicable to the Post Office Department, whose duties are primarily administrative rather than executive. The Post Office is only a very great business enterprise whose special character and importance make it desirable that it be conducted by the Government and not by private enterprise. Its successful conduct very obviously requires that its manager have power and discretion comparable with those which are customarily given to those who direct great private operations. Such limitations as Congress has from time to time imposed upon the Postmaster General have, therefore, been few in number and general in character and have been directed solely to the protection of the Government from the results of imprudence upon his part, or extortion on that of those with whom he must deal. It is to be expected that the Congress should leave those contracting with the Government to look after their own interests. A review of the statutes shows that such are the facts.

The first was the act of September 22, 1789 (1 Stat. c. 16). It authorized the temporary establishment of the Post Office, provided that the regulations should be the same as they had been under "the

resolutions and ordinances of the late Congress," [of the Confederation] and subjected the Postmaster General "to the direction of the President of the United States in performing the duties of his office and in forming contracts for the transportation of the mail." The "resolutions and ordinances of the late Congress" had limited the discretion of the Postmaster General only by requiring that he should make no contracts for service on new routes which should occasion expense to the General Post Office (resolutions of February 15, 1787, 12 Journals, Continental Congress, 10), and that in making general contracts for one year by stage carriages or horses, "as he shall judge most expedient and beneficial," preference should be given "to the transportation by stages, to encourage that useful institution when it can be done without material injury to the public." (Resolution, July 3, 1788, 13 Journals, 42.)

In 1792 (Act of February 20, 1792, 1 Stat. 232, c. 7), Congress dealt with the subject in detail and emphasized its intention to repose a very wide discretion in the Postmaster General. It empowered him

> to provide for carrying the mail of the United States, by stage carriages or horses, as he may judge most expedient; and as often as he, having regard to the productiveness thereof, as well as other circumstances, shall think proper, and defray the expense thereof. . . .

His power was limited only by a provision requiring contracts to be let only after advertisement (sec. 6), and by a provision that such contracts as he should

make for extending the line of posts beyond those authorized by the act should not exceed eight years nor be made "to the diminution of the revenue of the General Post Office."

The act of May 8, 1794 (1 Stat. 354, 358), reduced the maximum term for which contracts might be made to four years. Otherwise the powers conferred by the act of 1792 were continued from time to time in substantially the same language by subsequent statutes.

By 1813 a new means of transportation had come into use and the act of February 27 of that year (2 Stat. 805) recognized the fact by authorizing the Postmaster General "to contract for carrying mails of the United States in any steamboat" which might ply between post towns. A limitation was annexed which is the prototype of subsequent legislation and marks the purpose of Congress to fix certain maxima and then leave the matter to the discretion of the Postmaster General. It was provided that no such contract should be made for more than four years, nor at a greater rate of pay, "taking into consideration distance, expedition and frequency," than was paid for service by stage on the adjacent roads. Two years later (act of February 27, 1815, 3 Stat. 220) the maximum was stated in terms of money. The Postmaster General was authorized to have the mail carried "on such terms and conditions as shall be considered expedient," but not more than three cents for each letter or one-half cent for each newspaper was to be paid.

In 1838 the railroads had entered the situation. In authorizing the transportation of mail upon them, and making them "post roads," Congress followed the policy now well established of conferring upon the Postmaster General broad authority to contract at his discretion, but of imposing maximum limits upon the amount which he should agree to pay. By the act of July 7, 1838 (5 Stat. 271, 283), the Postmaster General was directed to cause the mails to be transported upon the railroads "provided he can have it done on reasonable terms and not paying therefor in any instance more than twenty-five percentum above what similar transportation would cost in post coaches." In the following year (act of January 25, 1839; 5 Stat. 271), this maximum was also made more definite by stating it in terms of money. The Postmaster General was forbidden to allow more $300 per mile per annum.

So from the very beginning of the carriage of mail by the railroads, the Congress neither attempted to compel the rendering of service nor perform the functions of the Postmaster General and to determine what rate he should offer therefor. It contented itself with prescribing a limit which he should not exceed and, within that limitation, left him to contract as best he could.

By the joint resolution of February 20, 1845, it emphasized still further that purpose by removing the requirement of advertising for bids, a requirement obviously ill suited to the practical necessities of the situation.

The important act of March 3, 1845 (5 Stat. 732, 738, c. 43), reflects the same policy. Section 19 of that statute is that which is here important. By that section it was made the duty of the Postmaster General, in order "to insure, *as far as may be practicable*, an equal and just rate of compensation according to the service performed," to divide the railroads into three classes according to the size of the mails carried and the speed and importance of the service. He was forbidden to pay *more* than certain amounts of compensation.

But even this limitation was not rigid. Where he deemed especially frequent service necessary, he was authorized to exceed the maximum compensation fixed by such amount

> as he may think just and reasonable, having reference to the service performed and the maximum rate of allowance established by this act.

It is especially significant that the Postmaster General was specifically authorized to resort to means of transportation other than the railroads

> in case (he) shall not be able to conclude a contract for carrying the mail on any such railroad routes, at a compensation *not exceeding the aforesaid maximum rates, or for what he may deem a reasonable and fair compensation.*

Argument as to the extent of discretion reposed in the Postmaster General is unnecessary in view of the language of this statute. He was to classify according to a prescribed general division. But the precise

indices which would determine the placing of a railroad in one class or another, to be created, were left wholly to his discretion. He was to pay "an equal and just rate of compensation," "as far as may be practicable." But only he was to judge what was equal and just, or what was practicable. He was to make contracts if he could do so on terms which *he* deemed to be "*a reasonable and fair compensation.*" Should he not succeed, he was given authority to turn to such other means of transportation as should offer. And such authority remained a part of the law after the acts of 1873, 1876, 1878, and 1907, upon which appellant relies. It was reenacted as section 212 of the act of June 8, 1872, revising and codifying the laws relating to the Postal Service, and became section 3999 of the Revised Statutes. The acts cited by appellant must be read in the light of it.

Between 1845 and 1873 there was a great development of the business of carrying the mails coincident with the great expansion of the railroads themselves, the increase in population, and the settlement of the West. The weight of the mails was multiplied, separate mail cars were introduced, the railway post office was developed, and other far-reaching changes occurred.

But the law remained unchanged. In the revision and consolidation of the statutes relating to the Post Office Department in 1872 (17 Stat. 283, 309, c. 335), the principal provisions of the act of 1845 were reenacted.

It is beyond argument that from the formation of the Government the rendering of service in carrying the mails, as well as the rates at which the service should be performed, was left by Congress to be settled by contract. In negotiating such contracts, there were but two limitations upon the discretion of the Postmaster General other than the obligation of his oath of office. These were the requirement that contracts should not be made to run more than four years, and that, except under certain specified conditions, the Postmaster General should not agree to pay compensation at rates exceeding certain maxima. The policy of leaving it to the Postmaster General, within those maxima, to obtain the best terms he thought possible appears consistently and continuously. There was not even a suggestion by Congress of an intention itself to fix the rates. It is in the light of this history and of the policy thereby shown firmly to have been established that the act of 1873 and the subsequent acts upon which the appellants rely must be read.

2. THE ACT OF 1873.

As has been just shown, the Postmaster General, under the act of 1845, was directed to classify the railroads of the country into three classes according to the size of the mails carried and the frequency and importance of the service. For the three classes thus resulting, differing maximum rates of compensation were provided. But the method of

the classification, the number and relation of the factors to be used, the indices of frequency and importance, the method of determining relative size—the factor capable of most accurate determination—were all left to his untrammeled judgment.

The act of March 3, 1873, undoubtedly introduced an important change, so far as the statutory situation went, in that it gave certain general directions regarding the method which the Postmaster General was to employ in determining the bases to which to apply his discretion in making mail contracts. But it did not change the policy of Congress to leave these matters largely to the discretion of the Postmaster General, and it did not even purport to fix rates other than, as before, to establish certain maxima.

It was, of course, followed by the amending act of March 3, 1905, which extended the weighing period from at least 30 to at least 90 days, but made no other change.

The act of 1873 begins by directing the Postmaster General to readjust compensation "upon the conditions and at the rates hereinafter mentioned," a circumstance not to be forgotten in weighing the contention of the appellants that in using similar language in the acts of 1876 and 1878, Congress intended absolutely to fix the rates of compensation and to remove the matter from the discretion of the Postmaster General. It proceeds with language which

removes any uncertainty as to its intentions. The conditions are that the mails shall be conveyed with "due" frequency and speed and that "sufficient and suitable" accommodations shall be provided. Whether in any given case these requirements are met is, of course, left to the judgment of the Postmaster General.

The statute then continued:

> And that the pay per mile per annum shall not exceed the following rates, namely: (1) on routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars * * * [etc.]

The maxima here imposed were graded, and it is required that this application shall be upon the basis of the average weight per day carried. In this respect there is a change from the requirements of the previous statute, but the change is merely one of degree, and the grading was for the sole purpose of determining the application of the maxima stated. The average weight which is to be the basis of this application is to be determined by actual weighing for not less than a certain number of days, done not less frequently than once in four years. But no more is said. In dealing with the weighing period, Congress followed again its policy of leaving such matters to the Postmaster General's judgment within very broad limits. How often the mails shall be weighed, for exactly how many successive days, at what time of the year, under what conditions—all these things are left to the untrammeled discretion of the Post-

master General, who is to determine whether the conditions of "due frequency and speed" and of furnishing of "suitable" room and the like have been complied with. No mention is made of any divisor, nor is there any attempt to prescribe any of the details of calculation. The intention of Congress to leave all these things to the Postmaster General's discretion was further shown by the supplementary act of March 3, 1875, in which the discretion of the Postmaster General was again recognized by authorizing him to "have the weights stated and verified to him under such instructions as he may consider just to the Post Office Department and to the railroad companies."

The degree of discretion given the Postmaster General under the act of 1873 will be further examined in another connection. It is plain, however, that, as before, Congress left to the Postmaster General authority to make such contracts, within the stated maxima, as he was able to make and to the railroads the option of agreeing to the terms which he should propose, or of refusing them and declining to perform the service desired unless better terms were offered. It said nothing which supports the contention that it fixed definite rates of pay for any given service.

3. SUBSEQUENT LEGISLATION.

It is claimed, however, that, though it may be difficult, if not impossible, in the face of the express language used, to establish that the act of 1873

was a definite fixing of compensation by Congress, such a result followed from the language employed in the acts of July 12, 1876; June 17, 1878; and March 2, 1907.

This contention is unsupported either by reason or authority.

The act of July 12, 1876 (19 Stat. 78, 79), directed that the Postmaster General should readjust compensation by reducing it "ten per centum per annum from the rates fixed and allowed by the first section of an act entitled (here follows title), approved March third, eighteen hundred and seventy-three." The act of June 17, 1878 (20 Stat. 140, 142), ordered a further reduction of "five per centum per annum from the rates for the transportation of mails, on the basis of the average weight fixed and allowed by the first section of an act entitled," (reciting said act of March 3rd, 1873). The act of March 2, 1907, ordered a reduction on routes carrying upwards of five thousand pounds of mail daily "by making the following changes in the present rates per mile per annum . . . and hereafter the rates on such routes shall be as follows . . . five per centum less than the present rates."

These statutes are all amendatory of the act of 1873. It has already been noticed that that statute directed readjustment "at the rates hereinafter mentioned." But the rates thereafter mentioned are, by their express terms, maxima only. Expanded the phrase means "at the rates hereinafter mentioned,

namely, the best rates which the Postmaster General can obtain but not exceeding these amounts to wit," etc. Reading the subsequent statutes with the act of 1873, it is perfectly plain that what was intended was a reduction of the maxima fixed by the act of 1873 and no more. This is especially true of the act of 1907 whose language read alone is that best calculated to give plausibility to appellant's argument. The act of 1907 affects only the heaviest and most attractive routes. It is hardly consistent with reason to say that Congress intended to leave the Postmaster General free to make the best terms he could as to the routes least attractive to the carriers, but to divest him of his discretion as to those which offered the most likely opportunity of making a good bargain.

It must not be forgotten that another statute *in pari materia* has remained upon the books throughout the period under discussion. It is R. S. 3999. It reads:

> If the Postmaster General is unable to contract for carrying the mail on any railway route at a compensation not exceeding the maximum rates herein provided *or for what he may deem a reasonable and fair compensation* he may contract [with other means of conveyance].

The authority here given is, of course, wholly inconsistent with the notion that Congress had definitely fixed rates and removed the matter from the discretion of the Postmaster General. It is

wholly consistent with the view that Congress had throughout contented itself with fixing maxima which the Postmaster General might not exceed, but expected him, within those limits, to pay only what he deemed *fair and reasonable*.

B. It Is Shown by the Decisions.

What is thus clear as an original matter is settled by authority.

The contention that in the acts of 1873, 1876, and 1878, Congress fixed absolutely the rates to be paid for carrying the mails, instead of merely setting maximum limits within which the Postmaster General should exercise his discretion, is not new. In *Eastern R. R. Co.* v. *United States*, 20 Ct. Cls. 23, it was held that this contention was unsound. On appeal to this court that decision was affirmed. This court said, 129 U. S. 391, 395:

> After the first of July, 1877, the company was under no legal obligation to carry the mails. It carried them after that date under an implied contract that it should receive such compensation as was reasonable, not exceeding the maximum rates prescribed by Congress and subject to a readjustment of rates as required by the act of 1876.

That decision made in 1885, and growing out of reductions made in pursuance of the acts of 1876 and 1878, has since been repeatedly followed by the Court of Claims (*Minn. & St. Louis Ry. Co.* v. *United States* (1889), 24 Ct. Cls. 350; *Texas & Pacific Ry. Co.* v. *United States* (1893), 28 Ct. Cls. 379, 389).

In the second of these cases, the Court of Claims said (389):

> It seems to have been assumed by the claimant that the statutes fix an absolute rate of compensation while in point of fact they fix only the maximum below which the Postmaster General is authorized to make such contracts as he deems the needs of the mail service may justify.

No appeal appears to have been taken from the decisions last mentioned. To the like effect is the case of *Atchison, Topeka & Santa Fe Ry.* v. *United States* (1911), 225 U. S. 640, 649.

In that case this court said (649):

> The statute defined a car line, but did not fix the compensation. It left that to be determined by the Postmaster General, who could have named any rate, not to exceed the statutory maximum.

It may be fairly assumed that these decisions have been known to Congress, which in turn must be assumed to have been content with the situation, since it did not take the easy way open to it of changing the situation by a clear expression of its intention itself to fix the rates.

C. It is shown by the Practice of the Post Office Department.

If it were a fact that the Postmaster General had in every case been willing to pay to the railroad companies the full rates permitted him by the statutes, it would be entirely consistent with the proposition

that Congress had fixed only maximum and not absolute rates. It would only reflect the judgment of the Postmaster General that under all the circumstances the price so paid was fair and reasonable and was the best at which he could obtain contracts for the service which he desired during that period.

It appears, however, that while the Postmaster General has, as a rule, been willing to offer the maximum permitted to him, the rule has by no means been without exception. Numerous instances of departure from the maxima appear in the reports of the Post Office Department.

Such departures are to be found in the numerous cases of "agreement routes" where the pay is fixed without weighing at the lowest rate named in the law, a rate frequently less than the weights actually carried would justify; "lap service" routes where pay is adjusted upon a reduced sliding scale (see Postal Laws and Regulations, 1913, sec. 1325; *Texas & Pacific Ry. Co.* v. *United States*, 28 Ct. Cls. 379); "blue tag" routes which provide for the transportation of certain kinds of mail matters in fast freight trains at rates less than the maxima named in the statutes, and "equalization" rates fixed on a basis of comparison with competing lines.

The *pro rata* allowance for weights intermediate between the limits of classification named in the statute is another instance of the same sort of discretionary action.

A striking example of the exercise by the Postmaster General of his power to offer compensation less than the maximum permitted by the statutes received the attention of this court very recently.

In *Atchison, Topeka & Santa Fe R. R.* v. *United States*, 249 U. S. 451, decided April 14, 1919, the statute involved (act of March 4, 1913), authorized the Postmaster General to add to the compensation for carrying the mails "not exceeding five percentum per annum." It was earnestly contended, in the light of what was there, as here, said to have been the uniform practice of the Post Office Department and of the legislative history of the matter, well known to Congress, that this statute required the Postmaster General to add a flat five percentum and that his action in giving distinctly smaller increases was in violation of law. This court held that the statute conferred upon the Postmaster General a discretion, which he had not been shown to have abused, and reversed the judgment of the Court of Claims to the contrary.

It may be added that Congress has understood fully that in so far as the Postmaster General has seen fit to offer the maximum rates permitted, it was not in obedience to the mandate of the law, but an exercise of discretion. In a report by the House Committee on Post Offices, made February 8, 1916 (Cong. Rec. 64th Cong., 1st sess., vol. 53, pt. 3, pp. 2316, 2318), it was said:

> In every law enacted by Congress on the subject of railway mail pay, since Congress first legislated 77 years ago in regard to the

carriage of mails on railroads (July 7, 1833), the Postmaster General has been given free and full power to contract with a railroad for the carriage of the mails at any rate within the maximum rates named in the several laws if he should be able to do so.

During the life of the present railway mail pay statute, passed in 1873, no Postmaster General has arbitrarily reduced rates, though under the law he has had full power to do so.

II.

UNTIL THE PASSAGE OF THE ACT OF 1916 CONGRESS HAS NEVER ATTEMPTED TO COMPEL THE RAILROADS TO CARRY THE MAILS, BUT HAS LEFT THEM FREE TO ACCEPT OR TO REJECT THE TERMS OFFERED BY THE POSTMASTER GENERAL.

This is apparent from the statutes which have been reviewed. R. S. 3999 (*supra*, p. 21), conferring upon the Postmaster General power to resort to other means of transportation should he find himself unable to conclude upon reasonable terms a contract with the railroads, is especially significant.

Morever, instances of refusal of the railroads to conclude contracts upon the terms offered have occurred, and the Postmaster General has frequently, in his annual reports, referred to the situation and its possibilities. Examples are to be found in the report for 1862, pp. 9 and 10; in the report for 1870, p. 11; in the report for 1877, pp. xxxiii and xxxiv; and in the report for 1888, p. xxxi. In these reports and others, the Postmaster General called to the attention of Congress the difficulties which constantly threatened the Department, and more than once

urged that Congress enact legislation which should make the service compulsory. In his report for 1888, the Postmaster General said:

> In this connection I call attention to the condition of the law, in urgent need of revision, which reposes no authority in any official of the Government to compel the owner of a railroad to receive and carry the mails of the Republic.
>
> In this state of things the Government is always at a disadvantage in negotiating for improved mail facilities and public opinion and sentiment are the only force to which the department can now appeal to secure them.

Notwithstanding these repeated recommendations, Congress took no steps to make the carriage of mails by non-land-grant roads compulsory until the act of July 28, 1916 (39 Stat. 419). That statute provided that all railway common carriers were required

> to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General, and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith. (Comp. Stat., 1918, Sec. 7482a, par. 27.)

The refusal to comply with the requirements of the statute was made an offense and an effective penalty provided.

That the railroads were free to accept the terms offered by the Postmaster General or to refuse them and decline to perform the service requested has been

repeatedly recognized by this court. Such was the ruling of the court in the following cases, among others:

Eastern R. R. Co. v. *United States*, 129 U. S. 391.

Chicago, M. & St. P. R. R. Co. v. *United States*, 198 U. S. 385.

Atchison, T. &. S. F. R. R. v. *United States*, 225 U. S. 640.

Delaware, etc. R. R. v. *United States*, 249 U. S. 385.

In the *Atchison case*, Mr. Justice Lamar said (650):

> The railroad, however, was not bound to furnish "half lines" nor to accept the terms named by the Postmaster General. For Congress had not so legislated as to require compulsory service, at adequate compensation to be judicially determined or in a method provided by statute.

In the *Delaware, Lackawanna & Western case*, Mr. Justice Holmes said (388):

> The railroad was free, as in the *Eastern Railroad case*, to decline to carry at the new rates, but could not insist upon the old ones after notice that they had been revised.

III.

THE APPELLANT VOLUNTARILY ENTERED A RELATION OF CONTRACT WITH THE UNITED STATES, AND ITS RIGHT TO COMPENSATION FOR THE SERVICE WHICH IT HAS RENDERED IS MEASURED AND LIMITED BY THAT CONTRACT.

The theory upon which the appellant seeks to recover is somewhat elusive. It denies that the circumstances which have been set out as to what the parties said and did constitute an express contract.

It seeks, says the Court of Claims (Opinion, R. 40), to rely "upon implied contract for recovery as upon *quantum meruit*."

As to the very great majority of the routes which are involved in the group of cases now before the court, the facts as to the service actually rendered stand stubbornly in the way of such recovery. This is well illustrated by the figures given by the Court of Claims in its opinion (R. 40). Speaking of what is said to be a typical route, the court says that the mail actually carried on 105 successive days was weighed and the weights totaled. The sum so obtained was divided by 105 and the daily average weight was found to be 143,314 pounds. To this figure, which is mathematically exact, the highest rates permitted by the statute were applied, and payments offered accordingly were accepted without objection or protest. Since, therefore, there has been payment at the highest legal rate for the mails actually carried, and since no conceivable measure of value more favorable to appellant than the highest legal rate is warranted by the record here, the Court of Claims puts (p. 40) the very pertinent question: "Can it [i. e., the appellant] recover under an implied contract as upon *quantum meruit* for [the] nine million pounds of mail which it did not in fact carry?"

The various claimants use differing language in endeavoring to meet this embarrassment, but in one form or another their contentions work out in an assertion that Congress has made them a statutory promise to pay a fixed rate; namely, the maximum

rate set out in the statute when applied to an "average" weight arrived at by using as a divisor the figure for which they contend. It will be noticed that there are two elements necessary to this contention. Appellant must show both that the divisor was fixed and that the rate to be applied after the divisor has been used was fixed absolutely and not as a mere maximum. Should appellant fail as to either factor, his contention here would fail. Whether, in view of the consideration about to be considered, it can stand even if both were established is a question which, while not conceded, need not delay the court. This is true because it has already been demonstrated both on reason and authority that Congress has not fixed any absolute rate of compensation, but has left the railroads and the Postmaster General free to contract. One of the essentials to appellant's case, therefore, fails.

And the parties, being thus free so to do, have entered into a relation of express contract. The contract has been fully performed on both sides. Nothing remains upon which to found a suit.

That the parties have made as to every route involved an express contract is specifically found by the Court of Claims (Opinion, Campbell, C. J., R. 63, 67; Booth, J., concurring, R. 68; Downey, J., concurring, R. 70). That being so, said the court

> The plaintiffs transported the mails in accordance with the terms proposed by the Postmaster General and, having been paid the sums respectively due them, it follows that their petitions should be dismissed.

And the court was right.

Taking the New York Central case as typical, and reviewing the events in sequence, the Postmaster General first sent out the customary distance circular. His express purpose was that of "obtaining data upon which the department may adjust the pay for mail service on the route * * * from July 1, 1909." In view of the fact that this circular, which in terms bound the department to nothing and which left to future determination so much that was vital to any effective contract, it would appear to be a mere preliminary to an offer to contract on the part of the Postmaster General. If, however, in view of the previous history of the dealings between the parties and of the other circumstances it could be said to be an offer, it was not accepted. The appellant failed to sign the so-called "acceptance clause" contained in the circular, and its letter only expressed a willingness to abide by the laws and regulations applicable to railroad mail service other than Order 412. Such an offer can not be accepted in part and the rest left to future negotiation. (*Minneapolis etc., Railway* v. *Columbus Rolling Mill*, 119 U. S. 149, 151; *Compania Bilbaina* v. *Spanish-American Company*, 146 U. S. 483, 497.) There was a rejection of the offer if one had been made. At the most, the claimant's letter was a counter offer to contract upon certain terms which, while not very precisely defined, involved an abandonment by the Postmaster General of his Order 412. If so, this offer to contract was expressly rejected by the Postmaster General in his letter dated January 5, 1909.

The Postmaster General's letter of January 5, 1909, was, under the decisions above noted, a restatement of the terms including order No. 412, in accordance with which he would contract for the service. Its language was especially directed to claimant's protest concerning Order 412. The terms of the Postmaster General's offer were made definite and final by notice to the claimant of his order of July 1, 1909. In that order, he fixed in precise terms the compensation which he would pay for the service which it was proposed this appellant should render. This was not an offer to compute compensation in any particular way, but to pay specific sums of money for specific services, e. g. for service upon route No. 104025, $305,253.67 per annum for the four years from July 1, 1909, to June 30, 1913. (Finding XII, R. 30.)

Notice of this order was sent to the claimant. The legal situation then was that the Postmaster General had said to the claimant, "If you carry the mails on route 104025 I will pay you therefor $305,253.67 a year and for the other routes which you serve the figures contained in my order as to them." It was no doubt still open to the claimant to say, "I will not perform the service," but it did not do so. It did perform without further objection. It was tendered periodically the amount of money which the Postmaster General had said he would pay; it accepted and received the sums tendered it without any further objection. (Finding XVI, R. 34, Opinion Campbell, C. J., R. 67.) The facts as to the Kansas City, Mexico & Orient Ry. Co. are even stronger. (*Supra*, pp. 9–12.) This performance of service

by the appellant and receipt by it of payment in the amount offered it for performance of service was an acceptance of the Postmaster General's offer notwithstanding the appellant's prior verbal protests against its terms. If those protests ever had legal significance, they were waived. (*Compania Bilbania* v. *Spanish-American Co.*, 146 U. S. 483, 497–498; *Atchison, Topeka & Santa Fe Railway Company v. United States*, 225 U. S. 640, 649.)

In the last case this court, by Mr. Justice Lamar, stated that whatever rule should apply to private parties, public policy requires that the mail should be carried subject to postal regulations, and that the department and not the railroad should, in the absence of a contract, determine what service was needed and under what conditions it should be performed.

In the opinion of the Court of Claims filed in these cases below it said:

> The distance circular proposed no terms and the readjustment order did. It was the acceptance and transportation of the mail and the repeated acceptance of the monthly or periodical pay after the Postmaster General had replied to the protests, all without protest or objection, that consummated the contract, the terms of which were evidenced by the notice itself.

Even where protests continued, and the railroads continued to carry the mails under the orders of and terms named by the Postmaster General the protests were of no effect. The terms named by the Postmaster General fixed the rights of the parties.

It must therefore follow that the Postmaster General having stated the terms on which he would contract for service and made the orders authorizing payment based accordingly upon order No. 412 and the statutes fixing maximum rates, and the appellant having carried the mails thereafter, it carried them under an express contract the terms of which were finally fixed by these steps.

The relations of express contract between the railroads and the Government arising under such transactions have been clearly stated in repeated decisions of the Court of Claims.

> *Minneapolis, etc., Ry. Co.* v. *United States* (24 Ct. Cls. 351, 360).
>
> *Delaware, Lackawanna & Western R. R.* v. *United States* (51 Ct. Cls., 426, 433).
>
> *Louisville & Nashville R. R.* v. *United States* (53 Ct. Cls., 238).

It is admitted that all of the claimants in these cases have been paid by the Postmaster General the sums which he said he would pay for the services if they were rendered. By rendering those services they agreed to accept those amounts and no more. They have accepted the payments knowing they were tendered as *full compensation*. Nothing remains upon which to found a further recovery. These considerations are decisive of this case. Where the proof shows an express contract however made, there is no foundation for suit or recovery on a basis of *quantum meruit*. (*Hawkins* v. *United States*, 96 U. S. 689, 698.) The attempt to show a promise by Congress of any fixed and different amount having

failed, there is left only the express and specific promise of the Postmaster General. That promise has been fully performed.

Even if claimants could have coerced more favorable contracts, that does not *make* a contract for them different from those which they accepted. The Postmaster General did not agree to pay *more* than he had authority to pay. The railroads accepted the sum offered and the contract has been fully executed on both sides.

IV.

EVEN HAD CONGRESS DIRECTED THE POSTMASTER GENERAL TO USE ANY PARTICULAR DIVISOR IN CALCULATING THE BASIS TO WHICH TO APPLY HIS DISCRETION, A DEPARTURE THEREFROM WOULD NOT ASSIST THE APPELLANTS.

Assuming for the moment, *arguendo*, that the statute had said in plain terms that the Postmaster General should use a certain divisor in calculating the average daily weight of mail carried, it would still be of no advantage to the appellant.

In the first place, it is necessary to inquire whether such a statutory provision would be mandatory or merely directory. If it were directory only, it ought to be followed, but does not so limit power over the subject matter that it can not be effectually exercised without observing the limitation. (*Hubert* v. *Lumber Co.*, 191 U. S. 70, 76; *De Visser* case, 10 Fed. 642, 648; *Martins Case*, 94 U. S. 400.) In other words, a deviation from a directory provision may subject the official to responsibility to the Government, but it can not be availed of by third parties. (*Bank* v. *Dandridge*, 12 Wheat. 64, 81.)

Whether a statute is directory depends upon the result of an examination of its nature, the object, the public convenience affected, and the apparent legislative intention.

Applying these tests, it is clear that the statute, if read to fix any particular divisor, was directory purely; that the directions given were not for the protection of the carrier but for that of the United States, and that Congress, in giving directions, carefully refrained from limiting the Postmaster General in the power which counted—that here exercised—to state within the statutory maximum what price in dollars and cents he would pay for the transportation of the mail over a particular route.

It has already been sufficiently demonstrated that the established policy of the Congress was to impose very few restrictions upon the discretion of the Postmaster General, and that those which it did impose were *maxima and not minima*. They were, therefore, obviously to protect the public treasury against the possible weakness or incompetence of the public official or against the extortion of those dealing with him. These were deemed to need no artificial protection, but were left to look after their own interests, being well able to do so in that they also were left free to refuse to contract at all if not suited with the terms offered. The nature of the restrictions, their apparent object and the balance of public convenience all tend to show that even reading the provision in the extreme manner for which appellant must contend, it remains at most a mere direction of whose

disregard they can not complain after having freely and voluntarily made contracts now fully executed on both sides.

The matter is, however, beyond dispute when it is reflected that the directions, whatever they may be, relate only to a matter preliminary to the making of the contract and the fixing of the rate, and that these effective steps are left, always within maximum limits, to the discretion of the Postmaster General, as has been shown.

To state the matter concretely, let it be supposed that the Postmaster General, after dividing the total weights obtained in 105 successive weighings by 105, as he did, had been convinced that he had not followed the direction of the statute, but that he should have divided by 90. If he deemed the compensation which he was proposing to offer upon the basis of average weight produced by dividing by 105 just and proper, convincing him that the statute required his preliminary calculation to have been made with a different divisor would not change that conclusion. He would simply adjust both sides of the equation, restating on the one side the average weight and reducing pro rata, on the other, the rate to be applied. The result would be exactly the same.

It follows that the entire complaint about the divisor is without point here unless and until appellant convinces this court that Congress fixed absolutely not only the divisor but the rate. Fixing a divisor to be used as a mere preliminary to the exercise of discretion as to rate could not help appellant and could not have been so intended.

The directions given that offers should be stated in certain amounts per mile per annum according to average daily weight and should be applied to a classification based upon actual weighing for a test period were obviously in the interest of efficient administration and for the benefit of the public. They substituted for a rough classification which might be governed only by the whim of the Postmaster General a method of calculation which could be understood and whose application would be open and subject to criticism or to further check if experience should prove them necessary. This was a sufficient reason for the act of 1873. It is unnecessary to read into its words a limitation which is not expressed, or even suggested, upon the traditional discretion of the Postmaster General and which is wholly inconsistent with the manifest continuance of that discretion in the really significant matter of determining the rate to be paid.

But even if there was a mandatory direction to the Postmaster General as to the use of a divisor, the effect would only be to render any use of another, whereby the Government was made to pay a greater sum, an excess of his authority. If he used a divisor, by reason of which the sum was within the amount he had authority to contract for, it would not render the agreement void, and the other party to the contract would have no ground to insist on a greater sum than his contract named.

V.

THE CALCULATION PROVIDED FOR IN ORDER 412 WAS A VALID EXERCISE OF THE DISCRETION WHICH THE LAW GAVE THE POSTMASTER GENERAL.

A. Under the Act of 1873, the Postmaster General Had Discretion as to the Method of Computing Average Daily Weight.

It has been shown that Congress has imposed upon the Postmaster General the duty of negotiating for the carriage of mails by contract; that for this purpose it has given him the widest discretion; that restrictions upon that discretion when made have been stated in plain and unmistakable terms. The very character of the Postmaster General's duties required Congress to give him very great latitude of action. It also has been shown, and is of fundamental importance, that Congress left to him, within maximum limits only, the power to determine what rates in dollars and cents he would pay per annum for the carriage of the mails over any given route on the average scale of daily weights and mileage fixed by law as the basis.

The question whether the Postmaster General by the act of 1873 was given discretion as to the manner of ascertaining the average daily weight of mails carried on railroad routes must, therefore, be considered in connection with this general and established policy of postal legislation and in the light of the ends sought by Congress. The thing of primary interest, both to Congress and to each railroad, is, of course, the actual compensation to be paid and not the method of its calculation. Congress directed that the compen-

sation for each railroad route should be controlled by certain graduated maximum rates which were to be applied to whatever may be found to be the average daily weight of mail carried on that route. But, except as limited by these maximum rates per mile per annum, the Postmaster General was given full discretion over the actual compensation. To say that Congress gave the Postmaster General discretion as to this major factor in computing compensation and withheld it as to the minor factor of obtaining average daily weight does not comport with reason.

The exact language of the act of 1873 required the Postmaster General to ascertain "the average weight" of mails carried per day on the various railroad routes. It directed him to ascertain this average by an *actual* weighing of the mails for *at least* thirty successive working days, at least once in every four years. Beyond this it did not prescribe how average daily weight was to be found. The word "average" imports, of course, a divisor and a dividend. One of the factors making up the dividend was fixed, *but as a minimum only*. Nothing is said as to the divisor.

A mathematical average for the daily weight of mail carried on a given route can be found accurately only by dividing the total weight of mail carried on that route during the weighing period by the actual number of days the mails have been weighed. On routes which have daily service—called by appellants "seven-day routes"—if mails were weighed for 35 days, the total weight would be divided by 35. On routes having no Sunday service—called by appellants

"six-day routes"—since weighings would be on only 30 days, the total would be divided by 30. If the act of 1873 can be said to have compelled the Postmaster General to adopt any definite divisor or divisors, and to have deprived him of all discretion in this matter, the divisor fixed by the act must be that in each case which will give the mathematical daily average weight.

The Postmaster General, in computing average weight under the act of 1873, has never adopted divisors yielding absolute mathematical averages. He has weighed the mails on "seven-day routes" for 35 days and on "six-day routes" for 30 days, and in both cases, until 1907, divided the total weight for the weighing period by 30. This practice the claimant accepts as correct and here contends that it is a requirement of law. But the far larger part of the mail is carried on "seven-day routes." Therefore its acceptance and the foundation of the appellants' case involve the assertion that under the act of 1873 the Postmaster General might compute average daily weight by any reasonable choice of divisor, and in the specific instance by one which admittedly does not produce a mathematical average for all routes.

That this is the foundation of appellants' case can not be questioned; and, in view of the general policy of Congress and of the other provisions of the statute which have been noted, is, no doubt, correct. A substantial advance had been made by requiring the use of some definite and comprehensible system based upon ascertained data, and that

was apparently all that Congress desired to do in this respect or thought it wise to attempt, in view of the constantly changing conditions affecting the situation. It certainly intended no more, or it would have said so. The conditions which it did impose upon the Postmaster General's discretion were clearly expressed, and he has steadfastly obeyed them.

B. If the Act of 1873 required a Rigid Divisor and the Postmaster General had no discretion to adopt an Approximate Divisor for use on all routes adapted to conditions existing at the Particular time, then the Railroads have been erroneously overpaid prior to the adoption of Order 412.

The claim of the plaintiff in error rests on the contention that the act of 1873 is mandatory. That under that act the mails are to be weighed not less than 30 working days. That all weights taken during said 30 working day period are to be aggregated, and a divisor of 30 days (covering a 35-day period of the calendar year) is to be applied and the quotient taken as the average daily weight extending through the entire year (or years) until another like weighing and division establishes another average daily weight.

This construction denies the right of the Postmaster General to use any discretion in reaching an average daily weight. For if such discretion be admitted, then the continuance of this system, first so adopted, would rest on discretion. Whenever the Postmaster General felt that changed conditions required a like exercise of discretion he could change.

The statute provides:

The mails must be transported with due frequency and speed. (What is such frequency and speed, the Postmaster General is left to fix when and as often as he deems proper.) Sufficient and suitable room, fixtures, and furniture (in his judgment) in a car or apartment properly warmed and lighted (he adjudging) shall be provided.

The pay "per annum shall not exceed the following rates" for routes carrying their whole length "an average weight of mail per day." (Here follows the maximum annual compensation per mile according to such average daily weights.)

Such weights are to be ascertained in every case by the actual weighing of the mails for such a number of successive working days not less than 30, at such times after June 30, 1873, and not less frequently than once in every four years, as the Postmaster General may direct.

Taking this act as mandatory, where discretion is not expressly stated, its declared objects are:

First. Actual weights are to be ascertained by weighings had for not less than 30 successive working days.

Second. The payment is to be for the service per annum.

Third. An average daily weight, for the 365 days in the year, is the basis for yearly compensation.

In addition to these declared objects, the following omissions are significant:

First. No formula is prescribed for ascertaining such daily average weight.

Second. There is no *command* that weights shall not be taken on days other than working days. There is no definition of "working days."

Third. There is no direction that weights taken on Sundays (if classed as nonworking days) shall be added to the weights taken on the other days of the week.

Fourth. There is no direction that, if so taken, such days shall not be reckoned as "divisor" days if required to get a "true" average daily weight for the 365 days of the year.

The plaintiffs contend—

First. That only secular ("working") days can be taken as a divisor.

Second. That weights taken on every day (7 days per week) shall be included in the weights to be divided.

If this is sound, then the only sound mathematical method to ascertain the average daily weight per annum is the formula given below:

Any other formula must rest on a discretion exercised by the Postmaster General and therefore be subject to change when a change of conditions makes him realize that the grounds on which his judgment was exercised have changed, and hence that the application of the same discretion calls for a change of method.

On the mathematical basis, arising out of the railroads' contention, taking the weights stated in the opinion of the Court of Claims (Rec. pp. 39, 40), we have: The weights for 105 days (90 working days, so-

called) are 15,047,790 pounds. We have in 105 days, out of the 365 days of the year, 90 so-called working days. This would make each 90 working days represent 105 days of the calendar year, and would show that 312½ working days were contained in, and represented, the 365 days of the calendar year. Hence on the weights above given the only correct way to get an average daily weight for the 365 days of the year is this:

As 105 : 15,047,790 :: 365 : 52,309,610; *or*
" 90 : 15,047,790 :: 312½ : 52,309,610.

The total mail weight for the year is therefore 52,309,610 ÷ 365 = 143,314 pounds daily weight.

But if the statute is mandatory that weighings are to be had only on working (secular) days, then they should not be had on Sundays. Assuming that the Sunday weights would average with the other days (which is most likely, as the mails of Sunday originate on preceding days, and mail service on the trains is about as frequent), and deducting one-seventh of the weights taken as Sunday weighings, we have 90 : 12,898,260 : : 365 : 52,309,610 pounds per annum, or 143,314 daily averages for 365 days.

The only basis, therefore, upon which the railroads have been enjoying in past years a daily average weight derived from adding seven days' weights per week as constituting six working days' weights, has been the exercise of the discretion exercised by the Postmaster General in adapting the general basis to a working basis, established to meet the conditions of service actually existing,

thus varying the mathematical basis necessary for absolute accuracy. This establishes the existence of such discretion.

Every argument used to support and justify the divisor and method used, establishes the existence of such discretion and the right of the Postmaster General to use it in meeting the varying conditions which actual changes in the method of carrying the mails in later years has rendered necessary.

It can not be successfully shown that the method of the Postmaster General, now adopted, does not more accurately ascertain the average daily weight of the mails than did the preceding method which the plaintiffs seek to establish.

If in point of fact the mails are carried seven days in every week, each day is *in fact* a "working" day; but whether so or not, if the seven days' weights in each week are added together and then divided by six days as a divisor, the quotient is not in fact an average one day's weight, but is *in fact* an average one and one-sixth days' weight, whatever name may be given it.

C. THE DISCRETION GIVEN THE POSTMASTER GENERAL BY THE ACT OF 1873 REMAINED IN HIM IN 1907.

1. DEPARTMENTAL PRACTICE HAS NOT AFFECTED IT.

If this matter of the divisor was thus left discretionary by the act of 1873, it remains only to inquire whether anything occurred between 1873 and 1907 to take away that discretion.

Looking first at the practice of the Post Office Department, it appears that from 1873 down to the promulgation of Order 412, in 1907, the Postmaster General continued the system of weighing all mail carried on any route over the same period of time, regardless of whether Sunday service was given, and of dividing the result by a multiple of six. An order issued in 1884, which would have adopted divisors equivalent to the actual number of days mails were weighed, was withdrawn before being put into effect. It is contended by appellant that this departmental practice has in some way destroyed the discretion as to a choice of divisor originally vested in, and exercised by, the Postmaster General.

The significance of the Hatton letter and the reply of the Attorney General (Finding VI, R. 22–24) had been entirely misunderstood as adverse to the selection of a 7-day divisor. Order No. 44 related only to 7-day routes. It did not propose any change of divisor on the 6-day routes. There was no submission of the question as to whether a 7-day divisor for the entire service was in accordance with law. The legality of that order was not submitted. The sole question presented was whether the existing practice with reference to a 6-day divisor was in accordance with, or in violation of, law, such divisor being applied to both classes of routes in accordance with the preceding practice, as opposed to the use of two divisors, a 6-day divisor for 6-day routes and a 7-day divisor for 7-day routes. The answer was in substance that a 6-day divisor was in conformity

with the law and that the use of different divisors at the same time (6-day and 7-day) would defeat the intention of the law. Apparently the reply of the Attorney General was intended to so state the matter, and with this conclusion there is no disagreement on the part of anyone. The opinion gave no reasons for the conclusion, but merely stated it in a few lines.

If the opinion was intended to mean that the existing divisor was mandatory and could not be changed, the opinion of the Acting Attorney General was not sought on this subject; the facts and data relating to this was not presented to him by the Postmaster General.

However, in 1907, the Order No. 412 here involved was submitted by the Postmaster General to the Attorney General for an opinion as to its legality, and in an elaborate opinion the Attorney General held the former opinion not binding and sustained the legality of Order 412 and of the method thereby adopted (26 Op. A. G. 390, 410).

The adoption by the Postmaster General of any divisor other than that giving a mathematical average was, of course, a construction of his power to exercise reasonable discretion in computing average weight. But it was no more. Where acts of third parties are done in reasonable reliance upon a long-continued and uniform practice, rights may exist and estoppel arise which would make a change ineffective as to those in whose favor these factors have operated. But except as to them, it can hardly be

contended that discretion relating to a continuing subject is exhausted merely by using it once.

The choice of a certain divisor over a long period did not, therefore, preclude a later different choice. The claimants here can not assert that the Postmaster General was estopped to change his practice. No attempt was made to affect past transactions or existing obligations. Order No. 412 operated wholly in the future. The services here rendered were rendered with full notice of the Postmaster General's intention. There can be neither waiver nor estoppel.

2. THE SUBSEQUENT ACTION OF CONGRESS HAS NOT AFFECTED THE POSTMASTER GENERAL'S DISCRETION.

Where a statute is open to inconsistent interpretations, no doubt that adopted by those charged with its administration is entitled to great weight, at least where transactions entered upon and carried forward in acceptance of that interpretation are concerned. The difficulty of applying the rule to this case is that it can not be shown that the Postmaster General has ever done anything inconsistent with the continued exercise of that discretion with respect to choosing his divisor, whose commitment to him by the act of 1873, as has been shown, is vital to appellant's case.[1]

[1] In determining average weights the Postmaster General has exercised discretion in other ways than in his choice of a divisor. In order to compute the average weight carried on a postal route, the weight at each station on the route is found and multiplied by the distance to the next station and the total of these products divided by the whole length of the route. Prior to 1908 the Postmaster General did not use actual fractions of a mile in making computations. Since 1908 fractions have been

The same difficulty meets an attempt to apply the further rule that the reenactment of a statute which has received such an administrative construction, without change, is an acceptance of that construction and a rejection of those inconsistent therewith. This is the argument which appellants base upon the passage of the act of March 3, 1905, in which the average weighing provisions of the act of 1873, are repeated with no change other than enlarging the minimum weighing period. But the argument begs the question. If the construction, as we insist, was that the Postmaster General had a discretion to use such reasonable divisor as was best under existing circumstances to reach a practical result, then the construction adopted establishes the right to continue to exercise his discretion as circumstances require. A further and final difficulty is that upon examination of the circumstances relied upon it will be seen that the situation which Congress refused to change, although it fully understood its existence, was that of discretion in the Postmaster General to use such divisor as, acting reasonably, he might see fit to choose.

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used. Will claimant contend that prior practice had become so embedded in the law that this change was invalid? Yet the statutes are no more silent concerning fractional distances than they are concerning divisors.

Furthermore, the use of any number of days as a divisor is the succeeding step to the one mentioned above, in securing an average: Where the sum of the products have been divided by the total length of the route, the quotient is then divided by the number of days (under Order 412, the total number in the weighing period) and this quotient is taken as the average weight per day. This step is of precisely the same character as the other. It can not be claimed that the Postmaster General was free to exercise discretion in the one case and not in the other.

The act of 1905 changed the minimum of days for weighing the mails, but it left the Postmaster General full discretion to increase both length and frequency of weighing as before.

A like purpose is manifest when one examines the history of the act of March 2, 1907, on which claimants especially rely.

The claimants contend that the proceedings in Congress in connection with the passage of this act show the intention of Congress to give legal permanence to the divisor then being employed. While the bill was being considered in Committee of the Whole House on the State of the Union, an amendment was offered, specifically enacting that the divisor to be used by the Postmaster General should be in every case the actual number of days on which mails were weighed (R. 26). This would have required the Postmaster General to use a 6-day divisor for 6-day routes and a 7-day divisor for 7-day routes. The point of order was made against this on the ground that it changed existing law. The Chair, in sustaining the point, observed that "the limitation on the discretion exercised under the law by a bureau of the Government is a change of existing law." (Cong. Rec. 59th Cong., 2d sess., vol. 41, p. 3471. (The House sustained this ruling. A point of order against a similar amendment was also sustained, and a provision to the same effect, which was in the bill as reported by the Committee on Post Offices and Post Roads, was then stricken out. If then these proceedings in committee have the weight which the

appellants ascribe to them, they show no more than an unwillingness to substitute a mandate for the discretion recognized as existing. The refusal, if any, was to order the Postmaster General to do what was proposed, but there was certainly no order that he continue what he was doing, if in his descretion he should conclude that a change was desirable (R. 26).

In the Senate the same amendment which was first rejected in the House was adopted. The conferees recommended that the Senate recede from the amendment. The conference report was agreed to in both Houses, and the bill was passed without the amendment leaving his discretion unfettered. (R. 27).

The legislative history of the act of 1907 makes clear that the issue presented was whether Congress would leave to the Postmaster General the discretion he then exercised in choosing a divisor for ascertaining average weight, or whether Congress would specifically enact what divisor should be used. The former course having been chosen, this action may fairly be said to have been congressional recognition of the Postmaster General's discretion.

Like recognition has subsequently been given. The Senate Post Office Committee reported an amendment to the post office appropriation bill of 1909, which fixed the divisor to be used in ascertaining average daily weight of mails. The amendment failed when the House refused to adopt it. In the Senate the active member of the committee, in explaining the bill, stated that the amendment was intended to crystalize into law the requirement that

seven days instead of six be used as a divisor. The chairman of the committee in the House declared that the provision "makes permanent law what is now known as the divisor. It is now but a departmental official order, subject to change or repeal by any subseqent official in control of the department. By making it permanent law, we avoid that possibility." (Finding XV, R. 33.)

As a matter of fact, in the annual reports for the year 1907 and following, the Post Office Department calculated its estimate of expenses for railroad mail transportation upon the application of the divisor established by Order No. 412, and its estimates for appropriations since 1907 have been prepared upon that basis. The reports have stated this fact and that the railroads were dissatisfied with Order 412, and had filed suits calling into question its validity (Finding XIII, R. 33, 34). Congress made its appropriations according to the estimates.

The failure of Congress, since 1907, to establish by legislation a definite divisor, indicates its willingness to leave the choice of a divisor to the discretion of the Postmaster General. It might be argued that in view of the long practice of the Post Office Department in using as a divisor a multiple of 6, Congress prior to 1907 considered the discretion of the Postmaster General in this respect of theoretical rather than practical importance. Since Order 412 went into effect, and the controversy over it arose, this can no longer be argued. Congress has left discretion in the Postmaster General, notwithstanding its knowl-

edge of the importance of the discretion given him and that in its exercise Order 412 has been used for many years.

VI.

THE DOCTRINE OF EXECUTIVE CONSTRUCTION, IF APPLICABLE HERE, SUSTAINS THE ACTION OF THE POSTMASTER GENERAL.

The appellants in these cases rely principally upon the doctrine of executive construction. This construction may be resorted to only in aid of interpretation and is not allowable to interpret what is in no need of interpretation. It is applied only in cases of ambiguity or doubt, but with language clear and precise, and with the meaning evident, there is no room for construction and consequently no need of anything to give it aid. (*United States* v. *Graham*, 110 U. S. 219.) Furthermore, the principle must be applied to some right created, accrued, or guaranteed by the construction relied upon, or to contract rights which will be impaired by its abandonment. (*Houghton* v. *Payne*, 194 U. S. 88; *United States* v. *Alabama Great Southern Railroad Co.*, 142 U. S. 615–622.)

The doctrine can have no application if the subject matter to which it is sought to apply it was not within the intent of Congress to legislate upon. The act of 1873 did not attempt, nor was it the intention of Congress thereby, to prescribe a specific divisor. The language used, which has been relied upon by appellants to indicate a purpose on the part of Congress to fix a specific divisor, in fact does nothing of the kind, but merely defines the minimum weighing period during which the Postmaster General is directed to

weigh the mails in order to determine the average daily weight. It can not be said, therefore, that with reference to the divisor the statute supplies the first and fundamental essential to the application of the rule.

Furthermore, the doctrine can not be applied excepting where the complainant has a right conferred or guaranteed by the legislation itself. The rule can not be invoked in a matter which is subject to change by the exercise of a discretionary power. It can only be relied upon to hold inviolate relations and rights which have arisen and become fixed in the past, and can control the future relations only when the statute confers or guarantees a right or benefit, and a construction of what the statute means has arisen by long usage. It can not apply, where a discretion remains in an executive to make a new rule as a matter of administration or to adopt a new course of action not in violation of contract or vested rights, to govern future relations, as in the case at bar.

Here the only thing done was a construction that the statute gave to the Postmaster General the power to adopt a single divisor applicable to all cases under existing conditions. The Postmaster General adheres to that construction, and so adhering, asserts the right to adopt the divisor now applicable to the subject under present conditions.

The rule insisted on by the claimants justifies the Postmaster General in adopting a six-day divisor in 1873 and a seven-day divisor in 1907. In both years he has construed the law to authorize him to adopt that

single divisor best adapted to arrive at average daily weights of the mails under circumstances existing at the particular time in order to carry out the law.

VII.

THE CONSIDERATIONS WHICH LED TO THE SELECTION OF A SIX-DAY DIVISOR IN 1873 CALLED FOR THE SELECTION OF A SEVEN-DAY DIVISOR IN 1907. ORDER 412 WAS A PROPER EXERCISE OF THE POSTMASTER GENERAL'S DISCRETION.

The Government's position here is that the Postmaster General exercised a sound discretion in the selection of both the divisor in 1873 and in 1907.

The annual report of the Postmaster General shows the relative importance of the six-day and the seven-day routes in 1873. (Table B, Annual Report, Postmaster General, 1873.) There were 781 railroad mail routes, on 684 of which the mails were carried only on six days of the week and on 97 on seven days of the week. The annual rate of pay on the former was $4,703,543, and on the latter, $2,553,653. The aggregate mileage of the former was 48,444 miles and of the latter, 15,013 miles. (Opinion of Court, Rec. 56.)

The annual reports for 1904, 1905, 1906, and 1907 show the situation for 1907 (Table B, Annual Reports, Second Assistant Postmaster General, 1904, 1905, 1906, and 1907). There were 1,394 six-day routes and 1,604 seven-day routes. The annual rate of pay on the former was $3,253,305, and on the latter $41,817,100. The aggregate mileage of the former was 48,705 miles, and of the latter 153,596 miles. (Rec. 56.)

It will be seen at a glance that there had been a complete change in the relation of the two classes of routes. From a predominance of six-day routes and pay in 1873 the change had swung to a still greater predominance of the seven-day routes and pay in 1907. (Congressional Joint Committee on postage and second-class mail matter and compensation for the transportation of mail, hearings, Jan. 16, 1914, pp. 987, 1024.)

The propriety of the action of the Postmaster General, as an exercise of discretion, is in no wise in issue in this case; but, if it were, no sounder reason or justification would be necessary in its support than these facts.

As the majority report of the Post Office and Post Roads Committee of the House stated in its report on the appropriation bill of 1907:

> The general development in the commerce of the country and the changes in the methods of business have fixed pretty definitely 365 days as the commercial year. While in some sections of the country, particularly in New England States, trains are not operated upon Sunday to the same extent as the other six days of the week, nevertheless there is a constant increase of the practice of daily service throughout the country. (H. Rept. No. 7312, 59th Cong., 2d sess., p. 5.)

CONCLUSION.

It is submitted that the judgments of the Court of Claims were correct and should be affirmed.

DECEMBER, 1919.

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